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In The

Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,
v.
THE BROOKLINE SCHOOL DISTRICT,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FURTHER REASONS FOR GRANTING THE WRIT

The Petitioners'[1] main brief focuses on their right, as parents, to advocate for their disabled children free from retaliatory and discriminatory conduct by the School District. Respondent's opposition brief ("Opp. Br.") ignores any reference to Petitioners' claims of such retaliatory-type conduct. Instead, Respondent focuses on the fact that the retaliatory conduct arose from the Parents' advocacy under IDEA in an effort to obscure the true nature of the Parents' claim for compensatory damages. The Respondent's suggestion that there was somehow a failure to exhaust administrative remedies similarly misses the point. The School District's failure to meet the Parents' arguments is fatal to the School District's opposition to the Parents' Petition.

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[1] Petitioners Catherine Burke and Mikael Rolfhamre (the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

Petitioners hereby reply to Respondent's opposition brief, pursuant to Rule 15.6.

I. THE SCHOOL DISTRICT'S OPPOSITION BRIEF IGNORES THE PARENTS' RETALIATORY CLAIMS BROUGHT UNDER SECTION 504 AND THE ADA.

The School District's principal argument – that the Parents' underlying claims represent an effort to "circumvent the established legal principle that damages are unavailable under the IDEA," Opp. Br. at 5 – is defeated by the School District's failure to account for the Petition's focus on retaliatory claims that sound under Section 504 and the ADA.

Petitioners' pro se complaint alleged, inter alia, that the School District discriminated, retaliated, interfered with, coerced, and intimidated Petitioners because of Petitioners' advocacy for their children. Petition at 5. While the complaint may have described the School District's violations of the IDEA, Opp. Br. at 5, the claim for compensatory damages is based on the School District's retaliatory conduct toward the Petitioners for which the Parents seek compensatory damages. Specifically, the complaint contains highly detailed allegations regarding the School District's activities against the Parents in response to their advocacy on behalf of their children. Both the Circuit Court and the District Court overlooked the essential nature of the complaint. With its Opposition Brief, the Respondent does the same.

II. PETITIONERS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Petitioners' Retaliatory Claims Under ADA and Section 504 do not Require Exhaustion of Administrative Remedies.

Because Petitioners are not bringing their claims under the IDEA, but rather under the ADA and Section 504, there is no exhaustion requirement.

Petitioners allege injuries under Title V of the ADA, which prohibits retaliation, interference, coercion, or intimidation. 42 U.S.C. § 12203. Petitioners allege that they suffered this discrimination because they opposed the unlawful actions taken by the School District. The harm of which the Petitioners complain is based on the acts covered by local government action and public accommodation provisions of the ADA, at Titles II and III. Such claims have no exhaustion requirements when they are brought as Title V retaliation actions. McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007) ("Accordingly, we hold that there is no administrative-exhaustion requirement for ADA Title III claims or Title V claims predicated on asserting one's rights under Title III."); Cable v. Dep't of Developmental Servs., 973 F. Supp. 937, 940 (C.D. Cal. 1997) ("Here, Plaintiff's Title V claims rely on acts and practices Plaintiff alleges were unlawful under Title II of the ADA. Thus, Plaintiff was not

required to exhaust administrative remedies before filing this action."), rev'd on other grounds, Cable v. Dep't of Developmental Servs., 54 Fed. Appx. 263, 264 (9th Cir. 2002). Therefore, exhaustion does not apply to Petitioners' ADA claim.

Section 504 of the Rehabilitation Act prohibits discrimination and exclusion from federally funded programs. 29 U.S.C. § 794. Petitioners' claim that the harassment, discrimination, and other actions carried out against them by the School District violated their civil rights under this Section. Section 504 does not impose an administrative exhaustion requirement on those who have been injured in this way. Smith v. City of Philadelphia, 345 F. Supp. 2d 482, 486 (E.D. Pa. 2004) ("Neither Title II of the ADA nor the Rehabilitation Act include a requirement that a plaintiff exhaust his or her administrative remedies before filing suit in federal court.") (citing and quoting Freed v. CONRAIL, 201 F.3d 188, 190 (3d Cir. 2000) (section 504 plaintiffs may proceed directly to court without pursuing administrative remedies); Saylor v. Ridge, 989 F. Supp. 680, 685-686 (E.D. Pa. 1998) (there is no requirement that administrative remedies first be exhausted before suit may be commenced)); see also Freed, 201 F.3d at 192 ("[W]e are presented with the narrow issue whether a plaintiff suing solely under section 504 must exhaust the Title VI administrative process before bringing suit against a private recipient of federal funds. We know of no precedent, in this court or elsewhere, that imposes such a requirement."); Pendleton v. Jefferson Local School Dist. Bd. of Educ., 1992 U.S. App. Lexis 6294 (6th

Cir. 1992) ("We agree with the district court's holding that the Rehabilitation Act does not require exhaustion of administrative remedies before bringing a civil action."); Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980) ("[T]he Rehabilitation Act does provide the handicapped with affirmative rights, does create a private right of action and does not require exhaustion of administrative remedies.").

B. Because Petitioners' Retaliatory Claims were not FAPE-Based, They Were not Required to Exhaust Such Claims at the Administrative Level.

The Petitioners are not bringing their claims under the IDEA. They do not base their claims on a denial of FAPE, nor do they seek the kind of relief that could be granted through any IDEA administrative hearing. Therefore, there is no IDEA exhaustion requirement that applies to this action. M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1158 (11th Cir. 2006) ("As we have held, 'the exhaustion of ... administrative remedies is not required where resort to administrative remedies would be 1) futile or 2) inadequate.'") (quoting N.B. v. Alachua County Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996)).

Because the Parents' retaliatory claims under the ADA and Section 504 are not FAPE-based, they are outside of the scope of the IDEA and the Parents are not required to exhaust these claims administratively. See Padilla v. School Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) ("In essence, the

dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. [...] If not, the claim necessarily falls outside the IDEA's scope, and exhaustion is unnecessary.").

Petitioners have carefully followed the procedural requirements on their children's behalf in other administrative hearings not on appeal here (and in which, incidentally, the Respondent has never been finally adjudicated to have successfully satisfied FAPE requirements for the Petitioners' children). However, in this case there is no exhaustion requirement to satisfy.[2]

C. The Court Should Disregard The School District's Reference to the Administrative Record.

The Opposition Brief devotes considerable space to recounting prior judgments and prior administrative hearings which are not before this Court. Opp. Br. 1-4. The procedural muddle it conjures up has no bearing on the present case;

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[2] Even assuming, arguendo, that exhaustion would apply to this case, the grant of certiorari would simply allow the case to proceed in the court below, where Respondent could raise exhaustion among its other defenses. Opp. Br. at 15 n. 6.

many of the cases and administrative hearings it mentions were adjudicated several years ago, some have long since been resolved, and others are currently pending before other courts[3] – but none are before this Court in this Petition and, more importantly, none concern the civil rights violations experienced by the Parents.

Even if the School District had provided FAPE to the Petitioners' children, (which the Respondent suggests and the Petitioners deny) this would have no affect on the viability of Petitioners' claims for retaliation under the ADA and Section 504. If the Petitioners had reached their objective in fulfilling their children's right to FAPE from the School District, the Parents' would still have a claim for compensatory damages based on retaliation and discrimination under the ADA and Section 504. The claims before this Court are for the harm suffered by the Parents because of the School District's retaliatory conduct in response to their advocacy. The claims are not predicated on the continued existence of FAPE deprivations. For this reason, even if the Respondent's assertion that the Parents

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[3] The erroneous assertion that the Petitioners have not prevailed in any of the many administrative hearings they have sought in order to try to achieve FAPE for their three daughters, is not only completely irrelevant to the question before the Court, but also powerfully underscores the pervasive effort to discredit Petitioners for exercising their rights. Opp. Br. at 11.

were not "prevailing parties" in administrative proceedings were correct, Opp. Br. at 17, it would be of no consequence to the present Petition. The cases upon which Respondent relies for this proposition are inapplicable. See Opp. Br. at 18 (citing Sch. Dist. of Wis. Dells v. Z.S., 184 F. Supp. 2d. 860 (W.D. Wis. 2001), aff'd, 295 F.3d 671 (7th Cir. 2002) (barring Section 504 claims because they were brought by the student, not by the parents, and did not involve claims for retaliation)).

III. THE QUESTION BEFORE THIS COURT IS ONE OF PURE STATUTORY INTERPRETATION.

The procedural posture of this case allows this Court to address the Circuit split. Contrary to the Respondent's argument, the First Circuit ruling in Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) simply cannot be reconciled with the Ninth Circuit's ruling in Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008). In Mark H., after explaining the distinct nature of Section 504 claims and IDEA claims as "overlapping but different," the Ninth Circuit unequivocally held that "Congress has clearly stated its intent to preserve all remedies under § 504 for acts that also violate the IDEA." Id. at 924. That Court noted the differences between Section 504 and IDEA throughout its substantial and well-reasoned opinion. See, e.g., id. at 929. ("While the IDEA focuses on the provision of appropriate education to disabled children, [Section 504 of] the Rehabilitation Act of 1973 more broadly addresses the provision of state services to disabled individuals.").

Mark H. squarely contravenes the central holding of Diaz-Fonseca when it states, "The district court held that the availability of relief under the IDEA precludes suits for damages under § 504 for government actions that violate both statutes. This conclusion was erroneous for two reasons." Id. at 932. The Ninth Circuit reaffirmed that the plain language of Section 1415(l) unequivocally provides for recovery and was passed by Congress as an explicit response to judicial interpretations prohibiting recovery under Section 504. The Respondent is asking this Court to resurrect that prohibition in this case. Id. at 934.

In Diaz-Fonseca, the First Circuit held, "that when the underlying claim is one of violation of the IDEA, plaintiffs may not use § 1983 – or any other federal statute for that matter – in an attempt to evade the limited remedial structure of the IDEA," and that Section 504 and ADA, "do not provide any broader remedies than those available under the IDEA." Diaz-Fonseca, 451 F.3d at 29, 30. Putting aside the fact that the Petitioners are not bringing any claim – 'underlying' or otherwise – under the IDEA or Section 1983, Respondent's assertion that this case is consonant with Mark H. is incorrect.

Respondent attempts to obscure this Circuit split by implying that the requirement of "independence" for Section 504 or ADA claims articulated by the Ninth Circuit in Mark H. has the same meaning as it does under Diaz-Fonseca in the First Circuit. Opp. Br. at 9. This is simply not true. Mark H. met the standard of "independence" even though, unlike the present case, it involved

claimants who brought *concurrent* Section 504 and IDEA claims premised on the *very same facts*. Mark H., 513 F.3d at 935. In Mark H., the complaint alleged that the Hawaii Department of Education's failure "to provide autism specific services to Natalie and Michelle during crucial years of ages three to seven through appropriately trained personnel and in appropriate classrooms was a violation of § 504 constituted deliberate indifference to the needs and rights of these children.'" Id. at 930. If the same standard of "independence" were recognized in both circuits, it would have been impossible for Diaz-Fonseca to have been the basis for upholding a dismissal of a complaint which did not plead IDEA violations and which clearly established claims for discrimination, retaliation, interference, coercion, and intimidation that are independent from classroom activities. This disparity among the circuits is at the center of the question presented by Petitioners.

Furthermore, this Court's ruling would prevent the implied repeal that Diaz-Fonseca has created. Petition at 20. Diaz-Fonseca's central holding that "where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under 42 U.S.C. § 1983, Title II of the ADA, or section 504 of the Rehabilitation Act," Diaz-Fonseca, 451 F.3d at 19, has had the practical effect of reading an implied repeal of the ADA and Section 504 into the IDEA. As such, the First Circuit overlooks the fact that the ADA was passed after the

IDEA. Further, such a reading would be prohibited by longstanding principles of statutory construction endorsed by this Court in Posadas v. National City Bank, 296 U.S. 497, 503 (1936) and recently reinforced in Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). Those Courts hold that where, as in the cases of the ADA and Section 504, a later statute that "creates rights" overlaps with a former statute that supplies its own "private means of redress," implied repeal is untenable.

Unless this Court resolves the glaring conflict between the First Circuit and the intent of Congress, and rejects this implied repeal of Section of 1415(l), Diaz-Fonseca will allow school districts to retaliate against and otherwise harass parents of IDEA-disabled children with impunity, secure in the knowledge that they cannot – by law – be liable for damages.

CONCLUSION

Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to review the questions presented in this appeal.

Dated: June 3, 2008

Respectfully submitted,

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